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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 9
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **WD Music Products, Inc.**

Serial No. 75/**931,278**

Jay Flemma of Ronald S. Bienstock & Associates, P.C. for **WD Music Products, Inc.**

Barbara A. Gaynor, Trademark Examining Attorney, Law Office 104 (**Sidney I. Moskowitz**, Managing Attorney).

Before **Hairston**, **Wendel** and **Rogers**, Administrative Trademark Judges.

Opinion by **Hairston**, Administrative Trademark Judge:

WD Music Products, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register the mark MONTEREY for "stringed musical instruments, namely electric guitars."¹ The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, contending that applicant's mark, when applied to the

¹ Application Serial No. 75/931,278, filed February 29, 2000; alleging a date of first use of December 6, 1999 and a date of first use in commerce of January 5, 2000.

identified goods, is likely to cause confusion with the mark MONTERREY which is registered for accordions.²

The marks are substantially identical and therefore confusion is likely, argues the Examining Attorney, because accordions and electric guitars travel in the same channels of trade, and are the kinds of goods which emanate from the same source. In support of the refusal, the Examining Attorney made of record copies of sixteen use-based third-party registrations of marks which cover accordions on the one hand, and electric guitars or guitars, on the other hand.

Applicant, however, maintains that confusion is not likely because it uses its house mark "WD" next to the MONTERREY mark on the headstock of each of its electric guitars and, thus, prospective purchasers would know that the guitars originate with applicant and not the owner of the cited registration. Further, applicant argues that its goods are highly specialized, are very different in nature from accordions, and are sold in different channels of trade from accordions. In particular, applicant maintains that its guitars feature a unique seven-string configuration; and that they are sold in only one place--direct from applicant through its mail order catalog. In

² Registration No. 2,319,265 issued February 15, 2000.

addition, applicant maintains that there have been no instances of actual confusion.

Turning first to the marks, as noted by the Examining Attorney, applicant's "WD" house mark does not form part of the mark sought to be registered in this case. Rather, applicant seeks to register MONTEREY only, and in determining likelihood of confusion, we must compare this mark with the mark MONTERREY in the cited registration. It is obvious that MONTEREY and MONTERREY are identical in sound and commercial impression and that they are substantially identical in appearance; the only difference being the additional letter "R" in the mark in the cited registration.

Turning then to the respective goods, we must decide the issue of likelihood of confusion based on the manner in which the goods are set forth in the application and the cited registration. In the absence of any limitations in applicant's application, we must presume that the electric guitars listed therein include all types, and that they move in all channels of trade normal for such goods, not just through applicant's catalog, and are available to all potential customers. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Thus, we must assume that applicant's electric guitars include varying types which may vary in

the number of strings, and that they would be sold in music stores to amateur performers.

We recognize that electric guitars are very different in nature from accordions. It is not necessary, however, that the goods be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that, because of the marks used thereon, there would arise a mistaken belief that they originate from the same source. See *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

In order to show the relationship between accordions in the cited registration and electric guitars in applicant's application, the Examining Attorney has made of record a number of registrations which indicate that entities have registered a single mark for accordions on the one hand, and electric guitars or guitars on the other hand. These registrations serve to suggest that the goods involved in this appeal are of a type which emanate from a single source. In *re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988). For example, IMPERIAL has been registered for, inter alia, accordions and guitars; BELTONE has been registered for, inter alia, accordions and

guitars; CARLO ROBELLI has been registered for, inter alia, accordions and guitars; PARROT and design has been registered for, inter alia, accordions and guitars; ETEK has been registered for, inter alia, accordions and electric guitars; and ROYCE has been registered for, inter alia, accordions, electric guitars and electric bass guitars.

According to applicant, there have been no instances of actual confusion in the several years of coexistence of applicant's mark and the mark in the cited registration. However, there is no evidence of either applicant's or registrant's geographic areas of sales, or the amount of the sales under the respective marks. Moreover, since applicant asserts that it has marketed guitars only through its mail order catalog, there may not have been many opportunities for confusion to occur. Further, we are not privy to any instances of actual confusion of which registrant, not applicant, may be aware. In any event, the test is likelihood of confusion, not actual confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); and *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984).

In view of the foregoing, we find that the goods involved herein are sufficiently related that purchasers

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familiar with registrant's accordions sold under the mark MONTERREY would be likely to believe, upon encountering applicant's substantially identical mark MONTEREY for electric guitars, that the goods originate from a common source.

Decision: The refusal to register under Section 2(d) is affirmed.

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